COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. .....

COMMERCE-PACIFIC, INC., a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GEORGE BOUCHARD,
RICHARD A. PERKINS,
900 Wilshire Boulevard,
Los Angeles 17, California,
Counsel for Petitioner.

SUBJECT INDEX

	PAGE
Citations to opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	9
Conclusion	13
Appendix A.	
Statutes involved	App. p. 1
Appendix B.	
Memorandum opinion	App. p. 2
Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 7
Judgment	App. p. 17

TABLE OF AUTHORITIES CITED

Cases	Page
Addison v. Holly Hill Fruit Products, 322 U. S. 607	11
Alliance Manufacturing et al. v. United States, 39 Cust. Ct. 392, Abst. 61119	4
Louis Greenberg & Sons, Inc. v. United States, 39 Cust. Ct. 345, Abst. 60991	4
National Carloading Corp. v. United States, 36 Cust. Ct. 309	2, 4, 6
National Carloading Corporation v. United States, 39 Cust. Ct. 392, Abst. 61120	4
National Carloading Corporation v. United States, 39 Cust. Ct. 400, Abst. 61146	4
National Labor Relations Board v. Coca-Cola Bottling Co., 350 U. S. 264	11
National Labor Relations Board v. Hearst Publications, 332 U. S. 111	11
Roy A. Parsons v. United States, 37 Cust. Ct. 416, Abst. 60353	4
The Otto Gerdau Co. v. United States, 37 Cust. Ct. 402, Abst. 60309	4
The Otto Gerdau Co. v. United States, 37 Cust. Ct. 412, Abst. 60363	4
The Otto Gerdau Co. v. United States, 39 Cust. Ct. 331, Abst. 60945	4
The Otto Gerdau Co. v. United States, 39 Cust. Ct. 392, Abst. 61121	4
United States v. Embassy Restaurant, Inc., 359 U. S. 29	10
Walling v. Portland Terminal Co., 330 U. S. 148	10, 11
White v. Aronson, 302 U. S. 16	9

STATUTES	PAGE
Revenue Act of 1941, Sec. 551	3
Tariff Act of 1930, Sec. 1, Par. 1535	2
United States Code, Title 19, Sec. 1001	2
United States Code, Title 19, Sec. 1001, par. 1535	2, 4
United States Code, Title 26, Sec. 3406(a)(1)	2, 3
United States Code, Title 26, Sec. 4161	2, 3
United States Code, Title 28, Sec. 1254(1)	1
United States Code, Title 28, Sec. 1346	3

TEXTBOOKS	
46 Statutes at Large, p. 590	2
66 Statutes at Large, p. 757	2
68A Statutes at Large, p. 489	2

MISCELLANEOUS	
1 Encyclopedia Britannica (Perm. Ed., 1955 Print), p. 943	7
Webster's New International Dictionary (2d Ed.)	6
CCH Federal Excise Tax Reporter, Par. 1700	7

IN THE

Supreme Court of the United States

October Term, 1959

No. .....

COMMERCE-PACIFIC, INC., a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on May 25, 1960.

Citations to Opinions Below.

The opinion of the District Court [R. 18-23] printed in Appendix B hereto, *infra*, page 2, is reported in 175 Fed. Supp. 227. The opinion of the Court of Appeals, [R. 94-101], printed in Appendix B hereto, *infra*, page 7, is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 25, 1956: [R. 102; Appendix B, page 17, *infra*.] The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

Questions Presented.

1. Whether bamboo poles which the Government concedes are not "fishing rods" within the meaning of the tariff law (19 U. S. C., Sec. 1001, par. 1535; *Natl. Carloading Corp. v. United States*, 36 Cust. Ct. 309), are nevertheless subject to excise tax as "fishing rods" under the Internal Revenue Codes of 1939 and 1954 (26 U. S. C., Secs. 3406(a)(1) and 4161), as the Government contends and as the lower courts held.

2. Whether, in considering whether the bamboo poles in question are subject to excise tax as "fishing rods" within the meaning of 26 U. S. C., Sections 3406(a)(1) and 4161, the courts below were authorized to reject and ignore evidence of trade customs and usage according to which the articles are not known or described as "fishing rods," which term is applied to articles of a different kind.

Statutes Invo'ved.

The statutory provisions direct y involved are Section 3406(a)(1), Internal Revenue Code 1939 (26 U. S. C., Sec. 3406(a)(1), 55 Stat. 687) and Section 4161 of the Internal Revenue Code 1954 (26 U. S. C., Sec. 4161, 68A Stat. 489), which are identical in substance. Section 4161 is printed in Appendix A, *infra*, page 1.

Section 1, Paragraph 1535, of the Tariff Act of 1930, as amended July 17, 1952 (19 U. S. C., Sec. 1001, Par. 1535, 46 Stat. 590; 66 Stat. 757), is collaterally involved. The relevant provisions of that act are also set forth in Appendix A, *infra*, page 1.

Statement.

This is an action under 28 U. S. C., Section 1340 for recovery of excise taxes paid on the sale of jointed bamboo cane poles which the Government contends and the taxpayer denies are "fishing rods" within the meaning of 26 U. S. C., Section 3406(a)(1) (Internal Revenue Code 1939, as added by Section 551, Revenue Act of 1941) and 26 U. S. C., Sec. 4161 (Internal Revenue Code 1954).

The articles in question are bamboo poles which are cut, usually into two and sometimes three or four sections, for convenience in carrying. [R. 10, 55.] As imported and resold in this country without change the poles have been processed only to the extent of being cut, painted, wrapped with thread and hollowed out at the joints, and tipped with a wire loop [R. 0-71]. These articles are not suited to sport fishing [R. 41]. They are mostly sold to children for "drop-line" or practice fishing; also, they are used as beanpoles and flower supports [R. 40-41]. They are not considered "fishing rods" by the trade. The trade applies that term to a different article which is made of fiberglass, resin, or split bamboo (of a different kind), fitted with a reel seat, line guides, metal ferrules (if jointed), a handle, and a top, intended for sport-fishing, made by from 30 to 80 manufacturing operations (contrasted with the 5 or 6 simple processes applied to the petitioner's poles) and hence generally much more expensive than petitioner's poles ($1.50 to $150.00 for fishing rods as against 7 cents to $2.50 for petitioner's poles) [R. 35-72].

The articles here in question have been uniformly held not to be "fishing rods" within the meaning of the

tariff law (19 U. S. C., Sec. 1001, Par. 1535) in a series of Customs Court decisions in which the Treasury has acquiesced [R. 99]:

Natl. Carloading Corp. v. United States, 36 Cust. Ct. 309, Abst. 59620;

The Otto Gerdau Co. v. United States, 37 Cust. Ct. 402, Abst. 60309;

Roy A. Parsons v. United States, 37 Cust. Ct. 416, Abst. 60353;

The Otto Gerdau Co. v. United States, 37 Cust. Ct. 412, Abst. 60363;

The Otto Gerdau Co. v. United States, 39 Cust. Ct. 331, Abst. 60945;

Louis Greenberg & Sons, Inc. v. United States, 39 Cust. Ct. 345, Abst. 60991;

Alliance Manufacturing et al. v. United States; 39 Cust. Ct. 392, Abst. 61119;

National Carloading Corporation v. United States, 39 Cust. Ct. 392, Abst. 61120;

The Otto Gerdau Co. v. United States, 39 Cust. Ct. 392, Abst. 61121;

National Carloading Corporation v. United States, 39 Cust. Ct. 400, Abst. 61146.

In the first *National Carloading* case (39 Cust. Ct. 309, Abst. 59620) the Customs Court held:

". . . both the evidence offered in the case at bar and common knowledge indicate that fishing poles are a rather simple, rudimentary type of fishing equipment, while fishing rods are more elabo-

ately made products, having features of greater convenience in their use, such as jointed construction, and provision for handles and reel seats. The exact line of demarcation between fishing poles and rods might in some cases be difficult to determine, but we are of the opinion that the bamboo articles at bar do not approach the borderline between the two and are well within the category of 'poles' and outside the designation of 'rods.' The only feature of the article at bar which bears some similarity to the features of fishing rods is the rather crude joint provision, but this, we think, does not alter its basic character sufficiently to bring it within the scope of the term 'fishing rods.'"

In the instant case the district court rejected certain proffered evidence of commercial usage consisting of trade catalogs [R. 39, 59-62, 70; Pltf. Exs. 2, 5, 6, and 7], avowed its determination to ignore other evidence of trade usage [R. 39], and held, contrary to the view of the Customs Court, that the articles here in question are "fishing rods." [R. 18-21]. The court of appeals affirmed. On the subject of commercial usage the court of appeals commented only that certain of the trade catalogs had not been offered in evidence [R. 100]. That statement was incorrect, for they had all been offered and rejected [R. 76].

Both the district court [R. 20] and the court of appeals [R. 100] mistakenly stated, contrary to the fact, that the bamboo articles involved in this case are different from those involved in the cited Customs Court

decisions.[1] But in the internal revenue ruling [R. 85-86] upon which the district court relied [R. 20-21] it was conceded [R. 86] that in the first *National Carloading* case the Customs Court "held . . . that an **article *similar to that here in question*** is well within the catagory of 'pole' and outside the designation of 'rod.'" (Emphasis supplied.)

In this case Government counsel in the district court admitted that her position was inconsistent with the holdings of the Customs Court, for she asserted that the *National Carloading* decision "is erroneous even in its distinction of pole and rod" [R. 69].

The courts below placed reliance on one of the more extensive definitions attributed by a dictionary to the single word "rod," but that is not the statutory definition of the thing which is taxed. The excise tax law refers to "fishing rods." The dictionary definitions of the terms "fishing rod" and "fishing pole" are not synonymous, and there is no cross-reference from one to the other. "Fishing pole" is defined as "a slender tapering pole *to which a line is attached*, used for fishing." "Fishing rod" is defined as "a springy tapering rod of wood, *split* bamboo, steel, etc., made with several joints and used for fishing." (Webster's New International Dictionary, 2d ed.—Emphasis supplied.)

---

[1]The asserted distinction between poles cut in two and those cut in three or four parts is not well taken, for some of the later Customs Court decisions involved double- and triple-jointed poles. And, contrary to what is said in the opinion of the Court of Appeals, the poles involved in the instant case are not fitted with ferrules. There is no evidence tending to show that petitioner's poles are so equipped, and inspection of the physical exhibits [Pltf. Ex. 1 and Deft. Ex. A] will readily show that they are not.

Dictionary definitions thus indicate significant functional differences between "fishing rods" and "fishing poles." The line is attached to a fishing pole but not to a fishing rod. A fishing rod is used with a reel; the line is attached to the reel and runs through guides, free of the rod [R. 47-48; 58]. The functional differences here are: (1) line attached to a fishing pole has a constant length and can be raised or lowered in the water only by raising or lowering the pole, while line attached to a reel used with a fishing rod can be cast out or drawn in by means of the reel. The length of line which can be used with a fishing pole is practically limited by the length of the pole, but no such limitation is imposed on the length of line usable with a reel and fishing rod.[2] These functional differences account for the fact that fishing poles such as petitioner's are used only for "drop-line" fishing, mostly by children who "have to have something to dangle in the water"; "it is a training for them." [R. 40-41; 45].[3]

For another thing, it is to be noted that under the quoted dictionary definition of "fishing rod" the typical constituent materials mentioned are, besides wood and steel, "split bamboo," which is a fabricated product

---

[2]For example, a tuna fishing reel is capable of holding 600 to 1200 feet of line. (Encyclopedia Britannica, Penn. Ed., 1955 Print, Vol. 1, p. 943—"Angling.")

[3]Here it is worth noting that the excise tax is laid not on all "sporting goods," but only on certain specified articles, and a number of "items (used predominately for school sports and by children) are not taxable (regardless of who uses them) . . ." (CCH Federal Excise Tax Reporter, Par. 1700.) The articles used predominately by children are not specifically excluded; they are simply not listed in the schedules.

of 40 or 50 manufacturing processes [R. 45-46] as distinguished from the natural bamboo cane poles from which the articles here in question are made.

For an alternative ground of decision the district court held that the taxpayer had not carried the burden of establishing the negative proposition that it had not passed the burden of the excise tax on to its vendees. That holding was contrary to the only evidence, which the district court said it had no reason to disbelieve [R. 22, 64-67]. The issue respecting the alleged shifting of the tax burden was briefed and argued in the court of appeals but not decided by it; that court rested its decision solely on the proposition that the articles in question are fishing rods within the meaning of the excise tax law.

Samples of petitioner's poles and of fishing rods were received in evidence in the district court for the purpose of comparison [Pltf. Exs. 1, 3, 4; Deft. Ex. A], but have not yet been transmitted to this Court. If the writ of certiorari is granted the physical exhibits will be placed in the custody of the marshal of this Court and thereby made available for inspection by the Justices. Accordingly, resolution of the question may be aided by judicial notice, informed by the knowledge of the Justices, some if not all of whom we believe are fishermen.

Reasons for Granting the Writ.

1. The decision of the courts below conflicts in principle with the decision of this Court in *White v. Aronson*, 302 U. S. 16, wherein it was held that in laying an excise tax on certain kinds of sporting goods the Congress must have legislated with knowledge of how certain articles were regarded in commercial usage and how the trade recognized a definite distinction between different kinds of articles, some of which were accordingly held to be covered by the statutory language and hence taxed, others not.

In *White v. Aronson*, the particular question was whether jigsaw puzzles were "games or parts of games," taxed by provisions of the Revenue Acts of 1917 and 1918. In holding that the articles were not "games" within the meaning of the statutory language this Court stated in part:

> "Ample evidence disclosed that in commercial usage jigsaw picture puzzles were never regarded as games; also that the trade recognized a definite distinction between puzzles and games. We must assume that Congress had knowledge of these things. . . ." (302 U. S. 16, at 20.)

In the cited case, therefore, this Court attributed significance to the factors of "commercial usage" and a "definite distinction" which "the trade recognized."

In the instant case both the district court and the court of appeals refused to consider trade usage, which under the decision of this Court in *White v. Aronson*

should be considered in interpreting the statute. The writ of certiorari should therefore issue to furnish guidance to the lower courts in the interpretation of the revenue laws and to secure adherence to principles of statutory interpretation announced by this Court.

2. As petitioner pointed out in the courts below, "an anomalous situation is created if an article is deemed to be a 'fishing rod' for the purpose of excise tax law and not a 'fishing rod' for the purpose of customs duties." [R. 99].

It is true that the construction placed on words used in a particular statute is not "of *controlling* significance", in the interpretation of another statute (*Walling v. Portland Terminal Co.*, 330 U. S. 148, 150), but, as the writer of the opinion in the cited case later pointed out, while it is true that "a word need not mean the same thing in different statutes. . . . the meaning attributed in one Act is *far from irrelevant* to the interpretation of another." (Mr. Justice Black, dissenting with the concurrence of the Chief Justice and Mr. Justice Douglas, in *United States v. Embassy Restaurant, Inc.*, 359 U. S. 29, at 39.) (Emphasis supplied). These principles seemingly command the assent of all of the Justices, who have differed only in the application of the principles to particular statutory language.

Thus, in construing the relevant provisions of the excise tax law involved in this case, the courts below should have considered, as a factor "far from irrelevant," the interpretation uniformly placed on the same

words in another taxing statute, *viz.*: the tariff law. But they failed to do so.

It is submitted that the situation here disclosed is one in which uniformity of statutory interpretation is even more than ordinarily desirable. Here, the bamboo articles in question are imported by the same persons who offer them for resale without any alteration. If the Government's position is correct, when the articles in question pass through customs they are not fishing rods, but by a kind of miraculous intervention they become so when the importer resells them. This absurd result is not required by the language of either statute. Respect for the law will hardly be encouraged if merchants are thus to be taxed or not taxed, not according to the right of the matter or by reference to any difference between kinds of goods, but in a whimsical and arbitrary manner.

It is worth recalling that "legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (*Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 618; *National Labor Relations Board v. Coca Cola Bottling Co.*, 350 U. S. 264, 268-269.)

When the same words in different statutes are construed differently it is usually because important policy considerations compel different results. (See, *cf. National Labor Relations Board v. Hearst Publications*,

332 U. S. 111, 128, 129, and *Walling v. Portland Terminal Co.*, 330 U. S. 148, 150-152.) But policy considerations do not require or even recommend that the same articles be held to be fishing rods under the excise tax law but not fishing rods under the tariff law. The very same policies are involved in both laws, *viz.*: the policy of fiscal support of government through taxation and the opposing policy of protecting the citizen against exactions not clearly authorized by law. Whatever effect those policies may have on the interpretation of the tariff law and the excise tax law, their impact is the same in each case; they do not point one way in one case and the other way in the other.

Petitioner recognizes that the rank of the Customs Court in the judicial hierarchy is such that a conflict between it and a court of appeals is not of the kind which necessarily calls for certiorari review. But as long as the Treasury continues to acquiesce in the Customs Court holding that these bamboo poles are not "fishing rods," no case will ever reach the Court of Customs and Patent Appeals, and a conflict at the court of appeals level may never develop. And while the Customs Court, with the Treasury's acquiescence, goes on deciding that these articles are not "fishing rods," the internal revenue branch of the Treasury continues to assert, in this and other cases, that the same articles are "fishing rods" within the meaning of the excise tax law.

We are informed that in cases arising in Alabama and Mississippi as well as in California the same ques-

tion is involved in controversies between taxpayers and the internal revenue authorities. In view of the volume of imports from Japan the question is bound to recur. It is an important question of Federal law which has not been, but should be, decided by this Court. The writ of certiorari should therefore issue.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE BOUCHARD,

RICHARD A. PERKINS,

Counsel for Petitioner.

August 16, 1960.

APPENDIX A.

Internal Revenue Code of 1954:

Sec. 4161. *Imposition of Tax.*[1]

There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) a tax equivalent to 10 percent of the price for which so sold:

* * * * * * * * * * * * *

Fishing rods, creels, reels and artificial lures, baits and flies.

* * * * * * * * * * * * *

(26 U. S. C. 1958 ed., sec. 4161.)

Tariff Act of 1930, as amended July 17, 1952:

Sec. 1. *Articles Dutiable and Rates, Schedules.*

* * * there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States * * * the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely:

* * * * * * * * * * * * * * *

Par. 1535.

* * * fishing rods and reels, and parts thereof, finished or unfinished, not specially provided for, 55 per centum ad valorem; * * * all other fishing tackle and parts thereof * * * finished or unfinished, not specially provided for, * * * 45 per centum ad valorem.

(19 U. S. C. Sec. 1001, Par. 1535; 46 Stat. 590; 66 Stat. 757).

---

[1]Section 3406(a)(1) of the Internal Revenue Code of 1939 as added by Section 551, Revenue Act of 1941, c. 412, 55 Stat. 687 (26 U. S. C. 1952 ed., Sec. 3406) is identical in substance and is therefore not reprinted herein.

APPENDIX B.

[Title of District Court and Cause.]

Memorandum Opinion.

In this case the plaintiff seeks to recover certain excise taxes and poses the question whether the articles sold are "fishing rods" within the meaning of §4161, IRC 1954, which virtually re-enacted §3406(a)(1), IRC 1939 [26 U.S.C.A.]. The real question in dispute is whether the articles are rods or poles.

Plaintiff distributes articles made of bamboo which are intended to be used for fishing purposes. These articles come in from two to four sections that can be fitted together. Each section has string wrapped around the bamboo near the end, presumably for support purposes. At the end of the smallest section a metal loop is attached, where fishing line is to be tied or run through. The bamboo is treated with lacquer.

Under the general heading of "Sporting Goods" §4161, IRC 1954, imposes a 10% excise tax on the sale by the manufacturer, producer or importer of "fishing rods, creels, reels and artificial lures, baits and flies". IRC Regulations (1954) §316.91 refer to these items as "fishing tackle". Internal Revenue Bulletin 1958-34 (Revenue Ruling 58-425) ruled that the excise tax was not due on "sales of bamboo cane poles which are in their natural state or merely straightened, scraped or varnished; however, the tax does apply (as to a fishing rod) if they have been cut into sections and fitted with ferrules". The Bulletin went on to say that the "rod" versus "pole" distinction was not crucial, but rather whether the bamboo was designed and prepared for fishing purposes. The articles in question were in fact prepared for fishing purposes.

When you come to the distinction between a fishing pole and a fishing rod, you run into a brick wall. Just when a pole becomes a rod or when a rod reverts to a pole to me appears to be an insoluble question. Their use is basically similar and both come within the purview of "Sporting Goods".

Everyone was apparently happy and paid excise tax on the articles as rods over a period of time until the Customs Court decision, hereinafter referred to, when rods become poles. The Customs Court view was expressed in National Carloading Corporation v. United States, 30 Customs Court Reports 309, Abstract 59020 (1955). The Customs Court decided that for purpose of the Tariff Act of 1930, bamboo poles with a single fitted joint and string wrapped around the bamboo for support, were not "fishing rods" but were "fishing tackle" and hence taxable at a lesser rate. The Customs Court was interpreting 19 U. S. C. A. §1001, par. 1535, which provides:

> "Artificial flies, snelled hooks, leaders or casts, finished or unfinished, 55 per centum ad valorem; fishing rods and reels, and parts thereof, finished or unfinished, not specifically provided for, 55 per centum ad valorem; fish hooks, artificial baits, and other fishing tackle and parts thereof, fly hooks, fly boxes, fishing baskets or creels, finished or unfinished, not specifically provided for, except fishing lines, fishing nets and seines, 45 per centum ad valorem * * *"

In 30 Customs Court Reports, where the abstract of the National Carloading case appears, the prefacing comment (at page 305) states that "abstracts of decisions of the U. S. Customs Court at New York are published

for the information and guidance of officers of the customs and others concerned." They are not intended as an interpretation of the Internal Revenue Code a completely distinct statute and taxing operation. Revenue Rulings, the Internal Revenue Bulletin, etc. are designed to interpret the Internal Revenue Code.

While the Customs Court Abstract is a "guide" to the meaning of terms in the Internal Revenue Code, it should not be considered controlling. Two other aspects of the Customs Court decision might be mentioned. 19 U. S. C. A. §1001, par. 1535, *supra,* is more detailed than IRC §4161, elaborating on various types of fishing equipment. Thus each term in the Tariff Act can arguably be construed more narrowly than in the IRC. Secondly, the Customs Court was dealing with one joint poles only. Plaintiff in this case deals in one, two and three joint articles, which recalls the dictionary definition of a fishing rod as one with "several joints".

It is my considered view that the articles involved were "fishing rods" within the meaning of §4161, IRC 1954 and §3406(a)(1), IRC 1939, not something separate and distinct. At least the plaintiff has not overcome its burden of proving by a preponderance of the evidence that the articles involved were not "fishing rods". The rulings of the Commissioner of Internal Revenue are presumptively correct and I feel the evidence does not justify their disturbance.

Having decided that the bamboo fishing articles here in question are within the term "fishing rods", as used in §4161, IRC and hence subject to tax, no further matter need be decided.

However, even if the contrary result were reached, namely that these articles were not within the meaning of the term "fishing rods" as used in §4161, IRC of 1954, plaintiff would still not be able to prevail.

Section 6416, IRC of 1954, provides that no credit or refund "shall be allowed unless the person who paid the tax establishes * * *

"(1) That he has not included the price of the article * * * or has not collected the amount of the tax from the vendee".

The statute places the burden of proof squarely on the taxpayer. The burden of proof placed upon a claimant by the refund statute is an onerous one. Finck Cigar Co. v. Comm. Int. 134 F. 2d 261, 262 (5th Cir. 1943). The natural presumption, when a 10% tax is imposed on all manufacturers or sellers of this commodity is that this tax will be passed on to the customers as part of the cost of the product and will not be absorbed out of profits. Thus, as the court said in Andrews Jergens Co. v. Conner, 125 F. 2d 686, 689 (6th Cir. 1942):

> "Under the circumstances here present, very clear and decisive evidence was required to establish that appellants had not included the tax in the price of their products * * * the amount of the tax was no minor matter in determining the price at which the articles were to be sold."

As to how the burden of proof can be carried, the case of Vogel v. Knox 147 F. Supp. 10, 14, (D. C. D. Minn. 1957) gives guidance. There it is stated:

> "It is not unreasonable to expect an experienced businessman, as is the plaintiff here, to produce

records or analyses of the various factors that were considered in setting the price such as manufacturing cost, marketing expense, profit margin and the like. Mere uncorroborated testimonial utterances by the taxpayer, an interested party, are a poor subsfitute for such evidence."

Similarly in the case at bar, plaintiff failed to establish in detail its pricing structure, costs, market prices, profit margins, etc., either before or during the time the tax was collected. The bold statement by the President of plairtiff corporation that the tax was absorbed out of profits, which there is no reason to disbelieve, does not constitute "substantial evidence upon which a recovery could be predicted". Finck Cigar Co. v. Comm. Int. Rev., *supra*, 262. In other words, the substantial evidence required to overcome the natural presumption that a tax was passed on was not introduced by the plaintiff. The burden of proof has not been sustained.

The defendant is entitled to a judgment of dismissal. Counsel for defendant is directed to submit to me proposed findings of fact, conclusions of law and judgment in accordance with the rules of this court.

Dated: This 4th day of August, 1959.

/s/ BEN HARRISON,
Judge.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Commerce-Pacific, Inc., a corporation, Appellant, vs. United States of America, Appellee. No. 16,670.

May 25, 1960

Appeal from Judgment of the United States District Court, Southern District of California, Central Division.

Before: Stephens, Barnes and Jertberg, Circuit Judges.

Jertberg, Circuit Judge.

The basic question presented by this appeal is whether certain jointed bamboo cane poles are "fishing rods" within the meaning of Section 3409(a)(1) of the Internal Revenue Code of 1939, as amended (26 U.S.C.A. Section 3409), and Section 4161 of the Internal Revenue Code of 1954 (26 U. S. C. A. Section 4161), and therefore subject to manufacturer's excise tax which is imposed on sporting goods.

Jurisdiction was conferred on the district court by Title 28 U. S. C. A. Section 1340. Jurisdiction of this Court is based on Title 28 U. S. C. A. Sections 1291 and 1294.

The following facts are not in dispute: Appellant is a California corporation. Among the articles which it imports from Japan are certain jointed bamboo cane poles. When received by appellant such jointed bamboo cane poles have been straightened, scraped, varnished or lacquered, painted, cut in two, three or four sections, and fitted with ferrules or other means by which the sections might be joined together. At the end of each

bamboo cane pole a small wire loop is attached by winding thread and applying paint or adhesive to the bamboo cane pole. The purpose of the small wire loop is to provide a place to tie a line or string for fishing. These bamboo cane poles were prepared and used for fishing purposes.

During the period involved in this appeal, appellant filed timely quarterly excise tax returns and made timely payments of the manufacturer's excise tax on sales of the jointed bamboo cane poles involved in this action. Appellant timely filed a proper claim for refund of the excise taxes paid. When no action was taken on the claim for more than six months, the suit was instituted.

The district court held that the jointed bamboo cane poles imported and sold by appellant constitute "fishing rods" within the meaning of Section 3406(a)(1) of the Internal Revenue Code of 1939, and Section 4161 of the Internal Revenue Code of 1954.

Appellant concedes that if the jointed bamboo cane poles which were imported and sold by appellant are "fishing rods" they are subject to the tax.

Appellant's specifications of error are:

1. That the district court erred in holding that the jointed bamboo cane poles imported and sold by appellant constitute fishing rods within the meaning of the sections above cited, and in holding that the sales by appellant of such poles are subject to the manufacturer's excise taxes under the provisions of the sections referred to.

2. That the district court erred in holding that the appellant did not sustain the burden of proving that it

did not pass the manufacturer's excise tax on its vendees, in accordance with Title 28 U. S. C. A. Section 6416 of the Internal Revenue Code of 1954.

3. That the district court erred in refusing to receive in evidence Exhibits for identification 5, 6 and 7.

Chapter 32 of the Internal Revenue Code of 1954 deals with manufacturers' excise taxes. Subchapter D of Chapter 32 is titled "Recreational Equipment". Part 1 of said Subchapter D is titled "Sporting Goods". Section 4161 provides for the imposition of the tax, and in its pertinent parts is as follows:

"§4161. Imposition of tax.[1]

"There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories of such articles sold or in connection therewith, or with the sale thereof) a tax equivalent to 10 percent of the price for which so sold:

* * *

"Fishing rods, creels, reels and artificial lures, baits and flies."

The Treasury Regulations, so far as material in this case, are as follows:

Treasury Regulations 46:

"Sec. 316.90

"Scope of Tax.—(a) For the period October 1, 1941, to October 31, 1951, inclusive.—(1) Subsection (a)(1) of section 3406, I. R. C., as added by section 551 of the Revenue Act of 1941, imposes a tax on sales by the

---

[1]Sec. 3406(a)(1) of the Internal Revenue Code of 1939, as amended (26 U. S. C. A. Section 3406) is identical in substance.

manufacturer of the specified articles, equipment, and apparatus, including in each case parts or accessories therefor sold on or in connection therewith, or with the sale thereof.

* * *

"(4) The tax does not attach (unless otherwise indicated in subsection 3406(a)(1) to articles which, in view of their size, quality, or the substance of their material, are not capable of being used in the playing of any game, athletic event, sport, or as gymnasium equipment."

Sec. 316.91 [as added by T. D. 5099, and amended by T. D. 6029] Rates of Tax.—The tax is payable by the manufacturer on the sale price of the articles listed at the rates specified below:

	Percent
(a) All articles except fishing tackle:	
October 1, 1941 to October 31, 1951, inclusive	10
November 1, 1951 to March 31, 1954, inclusive	15
On and after April 1, 1954,	10
(b) Fishing tackle:	
All periods	10."

Treasury Regulations on Excise Taxes (1954 Code)

"Sec. 48.4161-1 Imposition and Rate of Tax.

(a) Imposition of tax—(1) In General. Section 4161 imposes a tax on the sale of the following articles (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) by the manufacturer, producer, or importer thereof:

* * *

Fishing rods, creels, reels and artificial lures, baits and flies.

* * *

(b) Rate of tax. Tax is imposed on the sale of the articles enumerated in section 4161 and paragraph (a) (1) of this section at the rate of 10 percent of the price for which such articles are sold."

The thrust of appellant's argument appears to be that the jointed bamboo cane poles in question cannot be classified as "fishing rods" because such poles cannot be used for sport fishing, although appellant concedes that such jointed bamboo cane poles were prepared, sold and used for fishing. Appellant further concedes that such poles are "fishing tackle" within the ordinary meaning of that term.

The statute does not limit the tax to items used in "sport fishing". No such limitation can be implied from the fact that part 1 of subchapter D is titled "sporting goods". Part 1 appears under subchapter D, which is titled "recreational equipment". The terms "recreational equipment" and "sporting goods" connote equipment and goods generally used in recreation, pastimes, games, diversion and amusement. Such terms are not limited to sporting goods or athletic equipment used in a particular or specialized manner by those who may be engaged in a particular recreational activity, pastime, game or amusement.

Appellant contends that the district court was bound by the testimony of the expert witnesses called by appellant who testified that a distinction is commonly recognized in the sporting goods trade or world between a fishing pole and a fishing rod. From such testimony appellant argues that since the appellee produced no wit

ness to show "that a fishing pole meant the same in the trade as a fishing rod" the findings of fact and conclusions of law of the district court, holding that the articles in question were fishing rods within the meaning of the statute imposing a tax on such articles, are directly contrary to the only evidence before the court. Appellant recognizes in his brief that in construction of the statute here involved the words of the statute must be accepted in their ordinary and every day meaning. This rule of construction was stated by this Court in *Herring Magic v. United States* (1958), 258 F. 2d 197. The sole question presented in that case was whether the patented device manufactured and sold by the appellant in that case was an "artificial lure" within the purview of Title 26 U. S. C. A. Section 4161. This Court stated at page 198:

"Because the statute sets out no definition of 'artificial lure' those words must be accepted in their ordinary and everyday meaning."

The same rule of construction was applied by the Court of Claims in *Hine v. United States*, 113 F. Supp. 340. In that case the sole question involved was whether fishing rod kits were "fishing rods" within the meaning of Section 3406(a)(1) of the Internal Revenue Code of 1939, as amended, which is substantially identical to the statute in question. At page 343 the court stated:

"* * * we feel this product falls within the commonly understood and accepted meaning of the term 'fishing rods.' This court has consistently held that words of a statute should be presumed to be used in their ordinary and usual sense within the meaning commonly attributed to them, unless the contrary clearly appears."

The statute in question does not define the term "fishing rod." Webster's New International Dictionary, Second Edition, Unabridged, contains the following definitions: "Rod: a support for a fishing line; a fish pole." "Fishing pole: a slender tapering pole to which a line is attached, used in fishing." "Fishing rod: a springy tapering rod of wood, split bamboo, steel, etc., made with several joints and used in fishing." It is to be noted that the definition of "fishing pole" makes no mention of joints. The definition of "fishing rod" states that it is made with several joints and is used in fishing.

The record discloses that the articles in question were imported and sold by appellant in the form received. The manufacturing process is essentially as follows: The bamboo cane poles are straightened and scraped. They are then cut into two, three or four sections. One end is reamed and the other end tapered, and the two ends are fitted with ferrules or other fittings so that the section may be taken apart to be easily carried, and when the sections are put together they form a pole or rod for fishing. The jointed cane poles are also varnished or lacquered to create a finish. Small wire loops are attached to the end so that a fishing line may be tied to it. Thread is wrapped around portions of the shaft to strengthen it. It appears to us that the dictionary definitions make no meaningful distinction between fishing rods and the jointed bamboo poles in question.

Appellant relies heavily on the case of *National Carloading Corp. v. United States* (1955), 36 Customs Court Reports 309. Title 19 U. S. C. A. Section 1001 states, "* * * there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States * * * the rates of duty which

are prescribed by the schedules and paragraphs of the dutiable list of this title * * *" therein set forth. Paragraph 1535, as amended July 17, 1952 [c. 1928, §3, 63 Stat. 757] provides:

"Par. 1535. Artificial flies, snelled hooks, leaders or casts, finished or unfinished, 55 per centum ad valorem; fishing rods and reels, and parts thereof, finished or unfinished, not specifically provided for, 55 per centum ad valorem; fish hooks, artificial baits, and all other fishing tackle and parts thereof, fly hooks, fly boxes, fishing baskets or creels, finished or unfinished, not specifically provided for, except fishing line, fishing nets and seines, 45 per centum ad valorem."

The Customs Court decided that for the purpose of the Tariff Act bamboo poles with a single fitted joint and string wrapped around the bamboo for support were not "fishing rods" but were "fishing tackle", and thence taxable at a lesser rate. It appears that the Treasury Department has acquiesced in the holding of the National Carloading decision in a number of cases. Appellant argues that an anomalous situation is created if an article is deemed to be a "fishing rod" for the purpose of excise tax law and not a "fishing rod" for the purpose of customs duties. Appellant's argument is not convincing for several reasons. In the first place, it is to be noted that Paragraph 1535 of Section 1001 differs in form and substance from the excise statute in question. It breaks down the general category of fishing tackle into considerable more detail than does Section 4161 of Title 28 U.S.C.A. Section 4161 does not mention "fishing tackle", whereas Paragraph 1535, after mentioning fishing rods and reels upon which a duty of 55 per cent tariff is imposed, states that on fish hooks, arti-

ficial baits, and all other fishing tackle and parts therefor not specifically provided for, a lower tariff is imposed. A tariff is thus imposed on both categories. In our view, the decision of the Customs Court construing a different statute does not preclude the classification of the jointed bamboo cane poles as "fishing rods" under a different statute which speaks in much broader terms. In the second place, it appears that the articles before the Customs Court were essentially different from the jointed bamboo cane poles in issue in this case. The poles before the Customs Court had only one joint, whereas the poles in the instant case were cut into two, three or four sections, and the ends of some of the sections were fitted with metal ferrules so as to strengthen them and make them fit together better, and wrapped to strengthen the shaft and other parts of the pole. Finally, the same word may have different meanings when used in different statutes. This is especially true where the statutes differ in form and substance, as is the situation here.

The appellant states that the district court's memorandum opinion "shows that the court had grave doubt about the matter and yet the district judge resolved the doubt in favor of the government and against the taxpayer." Appellant then cites authorities holding that in the construction of a revenue act doubts should be resolved in favor of the taxpayer and against the government. We find such authorities inapposite in view of the following statement in the memorandum opinion of the district court: "It is my considered view that the articles involved were 'fishing rods' within the meaning of §4161, IRC 1540 and §3400(a)(1) IRC 1939, not something separate and distinct."

With respect to appellant's specification of error that the district court erred in refusing to receive in evidence Exhibits for identification 5, 6 and 7, it appears that such exhibits were never offered in evidence by the appellant. It further appears that Exhibit 2 which appellant states was received in evidence by the trial court was in fact not received in evidence, but simply marked for identification. Such facts were conceded by appellant's counsel at the time of the oral argument before this Court.

In our view the district court correctly decided that the jointed bamboo cane poles here in issue are "fishing rods" within the meaning of Section 4161 of the Internal Revenue Code of 1954. They were, therefore, properly taxable and the judgment of the lower court must be and is affirmed. In view of such conclusion we deem it unnecessary to consider or to pass upon appellant's second specification of error hereinbefore set out.

Judgment affirmed.

United States Court of Appeals for the Ninth Circuit.

Commerce-Pacific, Inc., a corporation, Appellant, vs. United States of America, Appellee. No. 16670.

Judgment.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment. Filed and entered: May 25, 1960. Frank H. Schmid, Clerk.

ILE COPY

Office-Supreme Court, U.S.
FILED
OCT 7 1960
JAMES R. BROWNING, Clerk

No. 335

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMERCE-PACIFIC, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

MELVA M. GRANEY,
CAROLYN R. JUST,
Attorneys,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 335

COMMERCE-PACIFIC, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question in this case is whether bamboo shafts imported by petitioner from Japan are "fishing rods" within the meaning of that term in the pertinent excise tax provisions of the Internal Revenue Code of 1939 and 1954. The shafts are composed of sections fitted with ferrules or other means by which they may be joined together (R. 27). They are prepared and used for fishing purposes (R. 27), and they are included within the term "fishing tackle" as generally used in the sporting goods trade (R. 15).

Petitioner contends that its products are not fishing "rods," but fishing "poles," and that the tax on fishing "rods" is therefore not applicable. Both courts below held to the contrary, and their opinions (Pet. App. 2-16) fully answer petitioner's contention. In the ordinary meaning of language, a shaft that is composed of several sections that are joined together is a "rod" rather than a "pole"; the latter consists of a long single piece of wood. This distinction was relied on in an Internal Revenue ruling (Rev. Rul. 58-425, 1958—2 Cum. Bull 804) that the manufacturers' excise tax is not applicable to bamboo cane poles that have been merely straightened, scraped and varnished, but is applicable to jointed cane poles that are designed and manufactured for fishing purposes.

Neither of the grounds upon which petitioner challenges the decision below has merit. The lower courts did not, as petitioner contends (Pet. 9-10), refuse to consider "trade usage" allegedly showing that petitioner's poles are not considered to be "fishing rods." The court of appeals referred to such evidence (Pet. App. 11-12), but refused to give it the conclusive weight that petitioner ascribes to it because the plain meaning of the statute is to the contrary. There is therefore no conflict "in principle" (Pet. 9) with *White* v. *Aronson*, 302 U.S. 16, where the Court relied on trade usage in holding that an excise tax on "games" did not apply to jigsaw picture puzzles.

Nor is the fact that the Customs Court has held that, for purposes of the Tariff Act, similar poles were not "fishing rods" but "fishing tackle," in any

way inconsistent with the holding below that they are "fishing rods" under the excise tax provisions here involved. For, as the court below pointed out (Pet. App. 14, 15), the Tariff Act "differs in form and substance" from the excise tax statute involved here, since it divides the general category of fishing tackle into two categories on both of which a tariff is imposed but at different rates. The excise tax, however, merely includes, as one category of sporting equipment, "fishing rods * * *." Moreover, as the court noted (Pet. App. 15), the articles before the Customs Court "were essentially different" from the articles involved here. The circumstances are such, therefore, as to call for application of the principle, recognized by petitioner (Pet. 10), that the construction placed on words used in one statute is not necessarily controlling in the interpretation of the same words in another statute. *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150.

The decision below is correct, and no conflict of decisions or important question is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

MELVA M. GRANEY,
CAROLYN R. JUST,
Attorneys.

OCTOBER, 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 586781 391

FILE COPY

Office-Supreme Court
FILED
OCT 19 19
JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 335

COMMERCE-PACIFIC, INC., a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION.

GEORGE BOUCHARD,
RICHARD V. PERKINS,
900 Wilshire Boulevard,
Los Angeles 17, California,
Counsel for Petitioner.

(4 A.S.R. Inc., Law Printers, Los Angeles, Phone MA. 6-4571)

TABLE OF AUTHORITIES CITED

Cases

Phila. Storage Battery Co. v. Lee, 21 F. (2) 329 2
White v. Aronson, 302 U. S. 16 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 335

COMMERCE-PACIFIC, INC., a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION.

1. In its attempt to distinguish the holding of the court of appeals in this case from the contrary doctrine uniformly adhered to by the Customs Court and acquiesced in by the Treasury, the respondent has departed from the record and repeated mistaken statements of the courts below.

It is misleading to state that the fishing poles here in question are fitted with "ferrules or other means by which they may be joined together." Memorandum in opposition, p. 4, this brief, p. 2. They are not fitted [illegible] any ferrule or [illegible] the sections of petitioner's poles may be joined [illegible] the normal [illegible]

Also, it is wrong to repeat the assertion of the court of appeals that the fishing poles dealt with by the Customs Court are "essentially different" from the articles involved here, in the face of the Treasury's concession that the articles are in fact "similar." [R. 86] as respondent's memorandum (p. 2) admits.

The fact is, of course, that it is the identical article which enters through customs (and is held not subject to the tariff on "fishing rods") that respondent nevertheless seeks to subject to excise tax as a "fishing rod" when it is resold in this country. The anomaly inherent in the Government's positions cannot be escaped.

2. Respondent asserts, without authority or reference other than *ipse dixit*, that "the ordinary meaning of language" supports its contention respecting the identification of the article which is taxed. That assertion ought not to prevail over trade usage: *White v. Arrow Co.*, 302 U. S. 16. It has been well stated in an excise tax case that

> "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them. The command here is directed to 'manufacturers, producers and importers' of the 'articles' named. It is, because of this, a fair inference that Congress spoke to them in their own language. This means that the phrases of the law are to be given the meaning they have in the trades concerned.
>
> "Aid is . . . given by adjudications in the customs cases, because the question is essentially one of classification."

White Storage Battery Co. v. Lyeth, [illegible] D. C.

3. Denying the conflict of the decision below with *White v. Ironson*, 302 U. S. 16, the respondent asserts without support in the record that the court of appeals did not refuse to consider trade usage. The facts are: the trial court rejected evidence of trade usage and, when petitioner offered a trade catalog describing the article in question, said "I don't care what Hoegee calls it." [R. 39]. The court of appeals affirmed without expressing any different view. It is clear that both of the courts below departed from the rule of the *Ironson* case.

4. Respondent asserts that no important question is involved. This position should be contrasted with that which the Government maintained when it successfully petitioned for the writ of certiorari in *White v. Ironson*, 302 U. S. 16, No. 20, 1937 Term. Asserting a conflict of decision (which this Court is not to exist, 302 U. S. 16, at 21) the Government's petition in that case argued (p. 8) that it "should be resolved in the interests of efficient administration to the end that the Treasury and the industry may be certainly advised of the scope of the statute." We adopt that language here in a better case, where a conflict does exist, and we request that the writ of certiorari be granted as it was in the *Ironson* case.

$15,000 for the period from October 1953 to June 1956, and additional assessments are proposed for subsequent periods. The issue is one of general interest to the trade, and substantial amounts of tax are claimed. It is submitted that the question is one of importance and should be authoritatively settled by this Court.

Respectfully submitted,

GEORGE BOUCHARD,
RICHARD A. PERKINS,
Counsel for Petitioner.